IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

S.A. No. 48 of 2006

Date of decision:-18-7-2006

~~**A.F.R. (Approved for Reporting)**~~

Not approved for reporting

Date:-18-7-2006 Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

Second Appeal No.48 of 2006

Basant Kumar Joshi
S/o Shri Mohan Chandra Joshi
R/o Village Malla Vishua
P.O. Ganiyadhioli
Tehsil Ranikhet
District Almora .....Appellant

Versus

Van Panchyat, mall Vishua
Through its Surpanch
Shri Deep Chandra Joshi
S/o Dhaniram Joshi
R/o village Malla Vishua
P.O. Ganiyadhioli
Tehsil Ranikhet
District Almora ...Respondent

Mr. T.A. Khan leaned counsel for the appellant.
Mr. Nand Prasad learned Standing Counsel

Hon'ble J. C. S. Rawat, J.

1. The second appeal has been filed under section 100 C.P.C. by the defendant-appellant against the judgment and decree dated 20.06.2006 and 28.06.2006 passed by the District Judge, Almora in civil appeal No.10/2003 Basant Kumar Joshi Vs. Forest Panchyat Vishua. The present appeal has been filed against the concurrent findings of the courts below.

2. Brief facts of the case are that a civil suit was filed by the respondent-Deep Chandra Joshi, Van Panchayat, Mall Vishua against Basant Kumar Joshi (defendant) with the allegations that the appellant-Basant Kumar Joshi had encroached the land measuring one mutthi of plot No.665 of khata No.73

in the year 1995 and constructed a tin shade thereon. Patti Patwari started the proceeding for eviction before the competent authority and the eviction order was passed on 07.08.1996. Feeling aggrieved by the said eviction order, the defendant preferred an appeal before the District Judge and the District Judge decided the appeal on 14.10.1997 holding that the suit under the provision of the U.P. Public Premises Act is not maintainable. It has been further ordered that the plaintiff's Panchayat may file a regular suit. After the order passed by the District Judge, the defendant again encroached the land measuring ½ nail and constructed a boundary wall in the month of January, 1998 around the aforesaid tin shade. In pursuance of the order of the District Judge, the present suit was filed by the plaintiff.

3. In response of the said suit, the written statement was filed by the defendant by which he denied the allegations of the plaint. It was further alleged by the defendant that the proceeding under the U.P. Public Premises (Eviction of Unauthorized Occupants) Act, 1972 had been dropped against him and as such these proceedings are not maintainable. The plaintiff-Deep Chandra Joshi was not competent to file the civil suit because the Forest Panchayat Malla Vishua has not authorized him to file the present suit and as such the suit was not maintainable. The defendant further alleged that the land in question belongs to U.P. Government, but the U.P. Government had not been impleaded as party. Hence, the suit was bad for non-joinder of

necessary party. Lastly, the defendant had prayed that the suit was not maintainable and it might be dismissed.

4. On the basis of the pleadings between the parties, the learned Civil Judge (S.D.) had decreed the suit of the plaintiff and had ordered the defendant to remove his construction over the land in question within a month vide order dated 30.09.2003. Feeling aggrieved by this, the defendant preferred a civil appeal before the District Judge and the District Judge dismissed the same vide order dated 20.06.2006. Feeling aggrieved by both orders of the courts below, the present second appeal has been filed before this Court.

5. On perusal of the record reveals that both the courts below had come to the conclusion that the Rule 27(g) of the U.P. Forest Panchayat Rules, 1976 provides that the Surpanch is empowered to file the civil suit on behalf of the Forest Panchayat. Both the courts below had held that Deep Chandra Joshi, the Surpanch was competent to file the civil suit on behalf of the Forest Panchayat. Both the courts below had further held that the Forest Panchayat was the owner of the said land and it was recorded in khata Ex.ka.4 that the forest panchayat was the land holder of the said property in which the appellant-defendant has made the encroachment. It was also held by the court below that the appellant gave an application to the SDM, Ranikhet for granting the said land in his favour and it was found that the land for which the prayer was made was a

part of plot No.665-the disputed one. Ultimately, the said application was rejected by the SDM. As such, no rights had been conferred upon the appellant-defendant. Both the courts below had also held that the appellant had stated on oath that he moved an application for grant of the disputed land and the same was rejected. Thus, the defendant-appellant cannot raise the question of the identity before this Court also. Both the courts below h ad held that that the defendant had not claimed any right over the property. He had no right to retain or to make construction over the said property. It was further held by the courts below that the proceedings of Public Premises Act, 1972 initiated against the appellant were of a summery nature and the appellant court had directed to file the suit as such the suit was maintainable. It was further contended that the proceeding with regard to the said property was also pending before the competent authority under the Public Premises Act, 1972 and these proceedings are of summery in nature. As such, the said suit is maintainable in this matter in view of section 9 of the C.P.C.

6. It was contended on behalf of the appellant that the findings of both the courts below are suffering from illegality and perversity and both the courts below had not rightly appreciated the evidence on record. It was further contended that several questions are involved which had been framed in the memo of appeal and these are the mixed questions of law and fact and the interference is required in

this matter. Learned Standing counsel refuted the contention and contended that the concurrent findings of both the courts below are not erroneous. Perusal of the impugned judgments reveals that there is no perversity in the appreciation of the evidence. I am completely in agreement with the findings recorded by the courts below. I do not want to restate the effect of the evidence or reiterate the reasons given by the courts below. Both the courts below have given the concurrent findings. The expression of general agreeing with reasons given by the courts below, decision of which is under appeal, would ordinarily suffice. **{See Girijanandini Devi Vs. Bijendra Narain Choudhary AIR 1967 SC P/1124 and Santosh Hazari Vs. Purushottam Tiwari AIR 2001 SC p965}**

7. The High Court in second appeal cannot proceed to re-appreciate the evidence. Even if the findings recorded by both the courts below were wrong, the findings of fact cannot be disturbed without coming to the conclusion that the findings recorded by the courts below were perverse i.e. misreading of evidence or based on no evidence. In the instant case the findings recorded by the trial court are not perverse.

8. The Hon'ble Supreme Court has held in **Santosh Hazari** (supra) that:-

> *"We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present section 100*

substituted in the Code. The first appellate court continues, as before, to be a final court of facts, pure findings of fact remain immune from challenge before the High Court in second appeal. Now, the first appellate court is also a final court of law in the that its decision on a question of law even if erroneous may not be vulnerable before the High Court in the second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

9. It has also been held in **Rajeshwari Vs. Puran Indoria 2005 (7) SCC p/60** that :-

> *"8. Before parting, we feel that we would be justified in pointing out that the amendment brought to section 100 of the Code w.e.f. 1.2.1977 by Act 104 of 1976, has really not advanced the cause of justice. Earlier, interference could be had under section 100 of the Code if the decision was contrary to law or some usage having the force of law; or the decision had failed to determine some material issue of law or usage having the force of law; or suffered from substantial error or defect in the procedure provided by the Code or any other law for the time being in force, which*

may possibly have produced the error or defect in the decision of the case upon the merits. The provision enabled the court to correct the errors of law or of procedure in an appropriate case and even unreasonable appreciation of evidence could have been brought within the contours of error of law in the circumstances of a given case. But by introducing the concept of "substantial question of law" in section 100 CPC, the right of the litigant to have a decision after a reappraisal of the relevant materials by the High Court has been curtailed. Though courts of first appeal are made the final courts of acts, there are instances when the first appellate courts merely, mechanically confirm the findings of fact rendered by the trial court without an independent reappraisal of the pleadings and the evidence in the case. Since a judgment of affirmance need not be as elaborate as a judgment reversing the decision of the court below, it is often contended that the judgment of the appellate court satisfies the requirements of Order 41 Rule 31 of the Code. There are occasions when the High Court feels the constraint of section 100 and reluctantly declines to interfere though interference would have been proper to render justice between the parties. The High Court are

often confronted with an argument that even if what was involved was a mixed question of fact and law or even a question of law, that did not constitute a substantial question of law justifying interference under section 100 of the Code. Why cannot an error of law committee by the appellant court be corrected in the second appeal? Why should not a litigant have an opportunity of having the decision in his case corrected for an error of law by the High Court at the second appeal stage? When a substantial question of law as expounded by this Court is only an open question of law substantial as between the parties, a restoration o f the position as it existed prior to 01.02.1977 does not appear to be reopening of the door too wide."

10. In view of the above, I would like to indicate that all question of law or fact of a mixed question of law and fact cannot be the substantial question of law. It is a well settled position of law that the scope of exercise of the jurisdiction by the High Court in second appeal under section 100 is limited to be substantial question of law. It was observed in Santosh Hazari case (supra) that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be a "substantial" question of law

it must be debatable, not previously settled by the law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the court. As to what would be the question of law “involving in the case” it was observed that to be a question of law “involving in the case” there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the court of fact and it must be necessary to decide that substantial question of law for the just and proper decision between the partiers. The jurisdiction of the High Court had been curtailed to correct the errors of law or the erroneous findings of fact of courts below even on question of law unless such question lf law be a substantial one.

11. In view of the foregoing discussion, I am of view that no substantial question of law arises for consideration in the present appeal. The appeal devoids of merit and is liable to be dismissed. Accordingly, the appeal is dismissed in limine. All the pending miscellaneous applications(s) in this case, if any, shall stand disposed of accordingly.

(J.C.S. Rawat, J.)

Dated 18.07.2006

LSR